



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

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MONTGOMERY COUNTY PLANNING BOARD
APPROVED AND ADOPTED GUIDELINE

RE: Guidelines For Interpreting the Definition of
"Subdivision" as it Applies to Mortgage and Lease Lines

INTRODUCTION

The Montgomery County Planning Board, after due notice and public hearing, adopts the guideline set forth below for purposes of determining whether the County Subdivision Regulations are applicable to certain property boundary line descriptions which are "created" by operation of a mortgage, deed of trust, groundlease instrument or other similar document creating a legal or equitable interest in a previously approved and recorded lot or parcel.

ADOPTED GUIDELINE

"For purposes of determining the applicability of the Montgomery County Subdivision Regulations (Chapter 50, Montgomery County Code) and Zoning Ordinance (Chapter 59, Montgomery County Code), the definition of "Subdivision" shall not be construed to encompass the division of land for the limited purpose of providing a security interest, leasehold interest, or other legal or equitable interest in a portion of a previously approved and recorded lot, tract, or parcel except as provided below. The creation of such interest and any subsequent conveyance to a third party by operation of the terms of the documents creating the interest may only be consummated with the understanding that the following contingencies (the "Contingencies"), except for the creation of boundary lines as contemplated by these guidelines, will not be impaired:

- (1) all purposes, policies, requirements, and standards of the applicable Subdivision Regulations, Zoning Ordinance, Montgomery County Code, and other applicable law as may then be in effect;
- (2) all terms, conditions, limitations, and agreements (jointly and severally) associated with any and all subdivision, site plan, project plan, development plan, and other plans as approved by the Planning Board.

A notarized, fully executed statement directed to the Planning Board and its General Counsels' Office by all parties proposing to create, receive, or otherwise benefit from the creation of such interest or subsequent conveyance under such interest by deeded metes and bounds transfer or otherwise shall be sufficient evidence of compliance with this Guideline, provided that the written statement indicates that the parties, by executing the statement, are intending to give the Planning Board satisfactory assurances that all of the Contingencies will remain in effect and are enforceable against any interest they may have in the subject property, jointly and severally. The Office of the General Counsel shall review all statements and may reject the statement for good reason if it does so within forty-five days of its receipt. Except for the Planning Board, only a party that executed the statement may rely on its contents.

This Guideline should not be construed as creating any right or expectation that further development, beyond that originally approved by the Planning Board in its consideration of applicable plan applications, may be forthcoming in the absence of securing all required plan revisions and resubdivisions. Consent to the creation of an interest, consistent with these Guidelines, shall not be construed as a resubdivision of property, nor a recognition that the division of the lot or parcel, as contemplated by the parties, warrant the approval of any subsequent plan revisions or resubdivisions."

BACKGROUND

Since 1985, the Montgomery County Subdivision Regulations and Zoning Ordinance, make clear that a building permit for virtually all construction may not issue unless the proposed construction is to be located on the entirety of a lot or parcel of ground shown on an approved and recorded plat. The area of construction may not be erected on the remainder (or portion) of a lot. (see Section 50-20, Montgomery County Code). A recorded lot or parcel may only be created by operation of the process for preliminary plan of subdivision. In applying for a building permit the applicant must affirmatively demonstrate that the area upon which construction is proposed, as contemplated in the permit, is an approved lot or parcel and not a portion thereof. Any new construction or reconstruction in the event of fire and the like must contend with these requirements.

A customary practice in the development industry, especially with commercial and industrial construction, is to construct several buildings on one lot, if permitted by the zoning. Thereafter, when the developer seeks to finance the project, the developer or its successors may obtain individual financing for each building from different lenders. Each lender will require that a security interest be placed on the building and a portion of the lot or parcel associated with the building.

In the event of a default under the loan documents, the lender may seek to acquire, through judicial determination by a court of competent jurisdiction, the building and the portion of the lot or parcel for which it has a security interest through foreclosure. If acquired, the lender may then attempt to sell or convey the building and property to a third party. This common practice may have the unintended effect of constituting a technical violation of the Subdivision Regulations by allowing a portion of an improved lot or parcel to be conveyed. The real impact of the problem would be felt if the building were destroyed and the then owner attempted to secure a building permit to reconstruct the building on the portion of the lot or parcel in which it then has an interest. The area contemplated for construction is no longer an approved lot or parcel. It is feasible, but unlikely, that the lender or successor could secure the signatures of all other parties having an interest in the entirety of the recorded lot or parcel, having them join in on the permit application. But most developers and lenders believe that this approach does not always achieve the desired results and fails to provide the level of comfort a lender is seeking prior to committing to a loan transaction.

A similar situation occurs when a lot, proposed to site multiple buildings, is carved into various tracts intended to envelope individual buildings, each building being separately owned by different entities. The portion of the lot that is associated with the individually owned building is reflected by a long term groundlease. This is not a fee simple interest conveyance by deed which would have the effect of creating an unbuildable tract under the Subdivision Regulations and is beyond the scope of these Guidelines. As with the case described related to a lenders security interest, a groundlease would also create problems for the groundlease tenant having a leasehold interest in a portion of a lot seeking to rebuild its building.

There are instances where other contemplated transactions may have a similar effect of drawing into question these aspects of the subdivision and building permit process, but without the intent of avoiding the purposes of the processes. For instance the creation of a condominium regime whereby portions of the lot approved by the Planning Board are subsequently conveyed to the Council of Unit Owners raises these questions.

As a general rule since 1985, Planning Department and the Planning Board have not been willing to provide assurances to parties making inquiries as to the impact of the foregoing requirements on their projects in the absence of express permissive provisions in County or State laws or adopted guidelines. Rather staff has urged such parties to seek a variation from the Subdivision Regulations as provided for in Section 50-38. This approach requires a public hearing by the Planning Board.

Many transactions attorneys have been giving a lender an opinion that these aforementioned practices, while technical violations of the Subdivision Regulations, are not violations that the Commission routinely enforces. Given the current state of the economy, many lenders advise that they are no longer comfortable accepting an opinion that relies on the Commission not enforcing what amounts to a violation of the Subdivision Regulations. As a consequence, staff has been approached by a number of attorneys asking that we consider generating appropriate amendments to the Subdivision Regulations or prepare guidelines to be adopted by the Planning Board which will create a practice that all parties can rely upon.

The Regional District Act Task Force commissioned last summer by the County Council to study the Regional District Act (RDA) recommended as part of its Report that the RDA be amended to revise the definition of "Subdivision" to allow for interpretations as proposed by these Guidelines.

The purpose of this proposed amendment was to put into State law permissive language which would enable the Planning Board and staff to provide the assurances sought by lenders and the like, without need of Board approval on a case by case basis. The recommendation was not contained in the Bill, evolving from the Task Force Report, that was approved by the Council and introduced by the House Delegation. Its absence was solely attributable to a decision not to include recommendations which could have an unintended, chilling effect on the application of the RDA in Prince George's County.

The foregoing guideline can be referred to by staff when responding to a developer, lender, etc. seeking assurances that a mortgage, groundlease, etc. will not result in a violation of the Subdivision Regulations or Zoning Ordinance. The guideline and any statement authorized under the guideline is not intended to vest the project from ANY change in applicable laws affecting new development or reconstruction of existing development.

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